Supreme Court, U.S.
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No. 01-518

IN THE

Supreme Court of the United States

BE&K CONSTRUCTION CO.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR UNION RESPONDENTS

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BRIEF FOR THE UNION RESPONDENTS

STATEMENT OF THE CASE

The instant unfair labor practice case arises from the filing of a federal court lawsuit by Petitioner BE&K Construction Company against the Respondent Unions for "[t]he purpose of . . . squelch[ing] certain concerted activity in which the unions were engaging on behalf of members." Pet. App. 3a. *See also id.* at 4a-9a (describing the course of that litigation); NLRB Br. in Opp. 3-5 (same).

In response, the Unions filed National Labor Relations Act § 8(a)(1) unfair labor practice charges against BE&K. The Unions' charges were held by the NLRB General Counsel while BE&K pressed its lawsuit and until the district court rendered judgment against the Company and the court of appeals affirmed that judgment. The General Counsel then conducted an investigation into the charges and issued an unfair labor practice complaint against BE&K. Pet. App. 29a. Ruling on the General Counsel's complaint, the National Labor Relations Board found that BE&K had committed a § 8(a)(1) unfair labor practice by "attempt[ing] to retaliate against the unions and their members for engaging in activities protected by federal labor legislation by filing the meritless lawsuit." *Id.* at 10a. To remedy this unfair labor practice, the Board "ordered BE&K to cease and desist from such illegal actions and directed the company to pay the legal fees and expenses incurred by the union defendants in the [retaliatory] litigation." *Id.*

Concluding that the NLRB's decision and order were consistent with this Court's decision in *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731 (1983), the Sixth Circuit enforced the Board's order. Pet. App. 25a.

SUMMARY OF ARGUMENT

I. The Sixth Circuit, in the decision below, correctly understood and properly applied this Court's decision in *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731 (1983). The language and logic of this Court's decision lead ineluctably to the Sixth Circuit's conclusion that "[t]he law as interpreted by the Supreme Court in *Bill Johnson's* . . . creates a bifurcated system of analysis in determining the protections to be afforded an employer for filing retaliatory lawsuits against employees and unions." Pet. App. 19a.

The Court of Appeals—reflecting the unanimous view of the five circuits that have addressed the meaning of *Bill Johnson's*—described the bifurcated system for analyzing retaliatory litigation unfair labor practice cases as follows:

> "Prior to a court ruling on the merits of the employer's suit, the Board will not find an unfair labor practice unless the underlying lawsuit was without reasonable basis. Following a court determination that the employer's claims are without merit, however, . . . the Board is justified in examining the motives of the employer to determine whether the company unfairly dragged the workers or their representatives into court to further illegal objectives." Pet. App. 19a.

This Court's opinion leaves no room for the Petitioner's argument that *Bill Johnson's* only permits the NLRB to act with regard to losing retaliatory lawsuits that were "objectively baseless."

II. *Professional Real Estate Investors, Inc v. Columbia Pictures Industries, Inc.*, 508 U.S. 49 (1993)—contrary to the argument advanced by the Petitioner in challenging the decision below—does not establish a sweeping First Amendment rule immunizing retaliatory labor dispute litigation that is not objectively baseless and, by so doing, displacing the *Bill Johnson's* rule subjecting losing retaliatory lawsuits to NLRA § 8(a)(1). There is not a word, or a hint, in *Professional Real Estate* that the Court intended to displace *Bill Johnson's*. Nor is there anything in the reasoning of *Professional Real Estate* that calls the balance struck in *Bill Johnson's* into question.

In *Professional Real Estate*, this Court defined the "sham litigation exception" to the antitrust immunity doctrine first identified in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961). The *Professional Real Estate* opinion makes clear that it is defining that exception as a matter of antitrust law. The definition of "sham litigation" framed in *Professional Real Estate* is attuned to the specific threats posed by the burdensome nature of antitrust litigation and the treble damages remedy provided by the antitrust laws. The point of the *Professional Real Estate* definition, and its limit, is to ensure that the threat of vexatious sham-litigation antitrust lawsuits does not chill plaintiffs from bringing their legal claims to court. *Professional Real Estate* accomplished this by including in the definition of "sham litigation" an "objectively baseless" component that facilitates the assertion of a *Noerr* immunity defense through a motion for summary judgment.

The enforcement scheme of the NLRA does not create the threat of vexatious litigation against which *Professional Real Estate*'s "objectively baseless" rule guards. In contrast to antitrust litigation, which is brought and controlled by a private party, NLRA unfair labor practice proceedings may be initiated only by the Board's General Counsel, who will issue an unfair labor practice complaint based on "retaliatory litigation" charges only if he is satisfied both that the litigation has been finally adjudicated against the plaintiff *and* that there is sufficient evidence to prove that the lawsuit was brought with a retaliatory motive. Also in contrast to the antitrust enforcement scheme, which provides for treble damages, the monetary relief awarded for a "retaliatory

lawsuit" unfair labor practice is limited to shifting the costs of the unsuccessful retaliatory litigation to the plaintiff who initiated that litigation.

ARGUMENT

The question presented on *certiorari*, as framed by this Court, is whether "the Court of Appeals err[ed] in holding that under *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731 (1983), the NLRB may impose liability on an employer for filing a losing retaliatory lawsuit, even if the employer could show the suit was not objectively baseless under *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 508 U.S. 49 (1993)."

Our two-fold answer to that question is this: *First*, the Court of Appeals, in enforcing the Board's decision and order, correctly understood, faithfully followed and properly applied *Bill Johnson's*. *See* Part I, *infra*. *Second*, nothing in the First Amendment dictates that the *Bill Johnson's* NLRA "losing retaliatory lawsuit" liability standard must be replaced by the *Professional Real Estate* antitrust law "objectively baseless lawsuit" liability standard. *See* Part II, *infra*.

I. THE COURT OF APPEALS CORRECTLY APPLIED THE RULE ADOPTED IN *BILL JOHNSON'S*

A. The *Bill Johnson's* Court succinctly stated the genesis of that case, its procedural history and the Board's decisional rationale as follows.

The unfair labor practice case at issue arose from the filing of a state court lawsuit by a restaurant owner against several of the restaurant's waitresses. The waitresses had "picketed the restaurant . . . carr[ying] signs asking customers to boycott the restaurant because its management was unfair to the waitresses." 461 U.S. at 733. "In addition, the picketers distributed a leaflet that accused management of making

'[u]nwarranted sexual advances' and maintaining a 'filthy restroom for women employees.' The leaflet also stated that a complaint against the restaurant had been filed by the [National Labor Relations] Board and that [one of the waitresses] had been fired after suggesting that a union be organized." *Id.* at 734.

In response to this activity, the restaurant owner's lawsuit "alleged that the defendants had engaged in mass picketing, harassed customers, blocked public ingress to and egress from the restaurant, and created a threat to public safety" and "also contained a libel count, alleging that the leaflet contained false and outrageous statements published by the defendants with the malicious intent to injure the plaintiffs." 461 U.S. at 734.

One of the defendant waitresses then filed an unfair labor practice charge with the NLRB alleging that the restaurant owner "had filed the civil suit in retaliation for the defendants' protected, concerted activities, and because they had filed charges under the Act." 461 U.S. at 734-735.

The NLRB General Counsel investigated the waitresses' charges and then "issued a complaint . . . alleg[ing] that [the restaurant owner], by filing and prosecuting the state suit, was attempting to retaliate against [the waitresses], in violation of §§ 8(a)(1) and (4) of the National Labor Relations Act." 461 U.S. at 735. And, after a hearing on the merits of the General Counsel's complaint, the Board found that the filing of the state-court lawsuit was an unfair labor practice and ordered the restaurant owner "to *withdraw its state-court complaint* and to reimburse the defendants for all their legal expenses in connection with the suit." *Id.* at 737 (emphasis added).

As the *Bill Johnson's* Court explained, the NLRB in finding an unfair labor practice "applied the rationale of *Power Systems, Inc.*, 239 NLRB 445, 449-450 (1978), *enf. denied*, 601 F.2d 936 (CA 7 1979), in which the Board held

that it is an unfair labor practice for an employer to institute a civil lawsuit for the purpose of penalizing or discouraging its employees from [engaging in protected activity]." 461 U.S. at 736.[1] Under the "*Power Systems* rule . . . an employer or union who sues an employee for a retaliatory motive is guilty of a violation of the Act." *Id.* at 739. And, as the Court also explained, under that rule, "the Board does not regard lack of merit in the employer's suit as an independent element of the . . . unfair labor practice," rather "the *only* essential element of a violation is retaliatory motive." *Id.* at 740 (emphasis in original). On the *Power Systems* view of the law, then, "prosecution of a totally meritorious suit might be deemed by the Board to be an unfair labor practice, if filed for a retaliatory purpose," *id.* at 740 n. 8, with the result that the Board would "issue a cease-and-desist order to halt [the] allegedly retaliatory lawsuit," *id.* at 737.

B. In its opinion, the *Bill Johnson's* Court subjected the NLRB's *Powers System* rule to close scrutiny for its conformity with the Act and with the First Amendment right to petition the government through access to the courts.

The Court began by noting that in purely statutory terms, "the Board's position seems to have substance." 461 U.S. at 740. In this regard, the Court found it pertinent that the NLRA's unfair labor practice provisions "are broad, remedial provisions that guarantee that employees will be able to enjoy their rights secured by § 7 of the Act—including the right to unionize, the right to engage in concerted activity for mutual aid and protection, and the right to utilize the Board's processes—without fear of restraint, coercion, discrimination, or interference from their employer." *Id.* It was also to the point that the Court "has liberally construed these laws as

[1] The *Power Systems* interpretation of the NLRA was developed in a series of unfair labor practice cases filed by employees *against* unions. *See Associated General Contractors v. NLRB*, 637 F.2d 556, 560-562 (8th Cir. 1980).

prohibiting a wide variety of employer conduct that is intended to restrain, or that has the likely effect of restraining, employees in the exercise of protected activities." *Id.*

With respect to the particular type of employer conduct at issue, the *Bill Johnson's* Court recognized that "[a] lawsuit no doubt may be used by an employer as a powerful instrument of coercion or retaliation." 461 U.S. at 740. Elaborating on this point, the Court explained:

> "[B]y suing an employee who files charges with the Board or engages in other protected activities, an employer can place its employees on notice that anyone who engages in such conduct is subjecting himself to the possibility of a burdensome lawsuit. Regardless of how unmeritorious the employer's suit is, the employee will most likely have to retain counsel and incur substantial legal expenses to defend against it. Furthermore, . . . the chilling effect of a state lawsuit upon an employee's willingness to engage in protected activity is multiplied where the complaint seeks damages in addition to injunctive relief." *Id.* at 740-741 (citations omitted).

While the foregoing militated in favor of the Board's *Power Systems* rule, the *Bill Johnson's* Court noted that "[t]here are weighty countervailing considerations . . . that militate against allowing the Board to condemn the filing of a suit as an unfair labor practice and to enjoin its prosecution." 461 U.S. at 741.

The first of these countervailing considerations is "that the right of access to the courts is an aspect of the First Amendment right to petition the Government for redress of grievances." 461 U.S. at 741. As the Court emphasized, it is necessary to "be sensitive to these First Amendment values in construing the NLRA in the present context." *Id.* In this regard, the Court observed that the NLRB itself had recognized that "[t]he right of access to a court is too important to be called an unfair labor practice solely on the

ground that what is sought in the court is to enjoin employees from exercising a protected right." *Id.*, quoting *Peddie Buildings*, 203 NLRB 265, 272 (1973), *enf. denied on other grounds*, 498 F.2d 43 (3d Cir. 1974).

The second countervailing consideration is "recognition of the States' compelling interest in the maintenance of domestic peace." 461 U.S. at 741. In this regard, the Court "has construed the Act as not pre-empting the States from providing a civil remedy for conduct touching interests 'deeply rooted in local feeling and responsibility,'" and "[i]t has therefore repeatedly been held that an employer has the right to seek local judicial protection from tortious conduct during a labor dispute." *Id.* at 741-742, quoting *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 244 (1959). For the NLRB "to *enjoin* the prosecution of a well-grounded state lawsuit" would mean that the "state plaintiff subject to such an injunction will be totally deprived of a remedy for an actual injury." 461 U.S. at 742 (emphasis added). "Thus, to the extent the Board asserts the right to declare the filing of a *meritorious* suit to be a violation of the Act, it runs headlong into the basic rationale of . . . [the] cases in which [the Court] declined to infer a congressional intent to ignore the substantial state interest 'in protecting the health and well-being of its citizens.'" *Id.* (emphasis added), quoting *Farmer v. Carpenters*, 430 U.S. 290, 302-303 (1977).

C. Based on these considerations, the *Bill Johnson's* Court modified the NLRB's *Power Systems* rule so as to further assure that "the employer has . . . its day in court" and that "the interest of the State in providing a forum for its citizens has been vindicated." 461 U.S. at 747. In so doing, the Court expressly approved the core principle that "it is an unfair labor practice to prosecute an unmeritorious lawsuit for a retaliatory purpose." *Id.* at 749.

In its essence, *Bill Johnson's* announces four intercommunicated governing propositions for NLRA § 8(a)(1) "retaliatory lawsuit" unfair labor practice cases. The first two propositions govern situations in which the allegedly retaliatory lawsuit has not yet gone to judgment; the second two govern where the lawsuit has gone to judgment:

- First, "[t]he filing and prosecution of *a well-founded lawsuit may not be enjoined* as an unfair labor practice, even if it would not have been commenced but for the plaintiff's desire to retaliate against the defendant for exercising rights protected by the Act." 461 U.S. at 743 (emphasis added).

- Second, "*baseless litigation is not immunized* by the First Amendment right to petition" and "the state interests . . . do not enter into play when the state-court suit has no basis," because "by definition, the plaintiff in a baseless suit has not suffered a legally protected injury." 461 U.S. at 743 (emphasis added). Therefore, "it *is* an *enjoinable* unfair labor practice to prosecute a *baseless* lawsuit with the intent of retaliating against an employee for the exercise of rights protected by § 7 of the NLRA." *Id.* at 744 (emphasis added).

- Third, "if the employer's case in the state court ultimately proves *meritorious* and he has *judgment against the employees*, the employer should also prevail before the Board, for the filing of a *meritorious* lawsuit, even for a retaliatory motive, is not an unfair labor practice." 461 U.S. at 747 (emphasis added).

- Fourth, "[i]f *judgment goes against the employer* in the state court, however, or if his suit is withdrawn or is otherwise shown to be *without merit*, the employer has had its day in court, the interest of the State in providing a forum for its citizens has been vindicated, and the Board may then proceed to adjudicate the . . . unfair labor practice case . . . [by] determining whether the suit had been filed in retaliation for the exercise of the employees' § 7 rights." 461 U.S. at 747 (emphasis added).

The *Bill Johnson's* Court spelled out the lesson of the foregoing propositions—and the distinction between *pending*, allegedly retaliatory lawsuits, and *adjudicated*, allegedly retaliatory lawsuits on which those propositions rest—in the most concrete terms:

> "[T]he Board may not halt the prosecution of a state-court lawsuit, regardless of the plaintiff's motive, unless the suit lacks a reasonable basis in fact or law. * * * [I]f the Board is called upon to determine whether a suit is unlawful prior to the time that the state court renders final judgment, and if the state plaintiff can show that . . . genuine material factual or legal issues exist, the Board must await the results of the state-court adjudication with respect to the merits of the state suit. If the state proceedings result in a judgment adverse to the plaintiff, the Board may then consider the matter further and, if it is found that the lawsuit was filed with retaliatory intent, the Board may find a violation and order appropriate relief. In short, then, *although it is an unfair labor practice to prosecute an unmeritorious lawsuit for a retaliatory purpose, the offense is not enjoinable unless the suit lacks a reasonable basis*." 461 U.S. at 748-749 (emphasis added).

Bringing these instructions to bear on the case before it, the *Bill Johnson's* Court specifically directed that if any of the petitioner-employer's "claims have been finally adjudicated to be lacking in merit, on remand the Board may reinstate its finding that petitioner acted unlawfully by prosecuting these unmeritorious claims if the Board adheres to its previous finding that the suit was filed for a retaliatory purpose." 461 U.S. at 750 n. 15.

D. In sum, the *Bill Johnson's* opinion "makes clear [that] the Board's ability to *enjoin* prosecution of a state suit is not the measure of its ability to determine that such prosecution

constitutes an unfair labor practice." 461 U.S. at 753 (Brennan, J., concurring) (emphasis in original), citing *id.* at 741, 749.

Given the clear language and logic of this Court's opinion, every circuit to have considered a post-judgment retaliatory litigation unfair labor practice case has agreed with the court below that

> "[t]he law as interpreted by the Supreme Court in *Bill Johnson's* . . . creates a bifurcated system of analysis in determining the protections to be afforded an employer for filing retaliatory lawsuits against employees and unions" in which, "[f]ollowing a court determination that the employer's claims are without merit, . . . the Board is justified in examining the motives of the employer to determine whether the company unfairly dragged the workers or their representatives into court to further illegal objectives." Pet. App. 19a.

Accord NLRB v. Vanguard Tours, Inc., 981 F.2d 62, 65 (2d Cir. 1992) ("Once the suit has been adjudicated, however, the standard is less forgiving to persons who have filed a retaliatory suit. If the plaintiff has lost on the merits—even if he had a reasonable basis in bringing suit—the Board may consider the filing of the suit to have been an unfair labor practice."); *Petrochem Insulation, Inc. v. NLRB*, 240 F.3d 26, 31-32 (D.C. Cir. 2001), *cert. denied*, 122 S.Ct. 458 (Oct. 29, 2001) (same); *Diamond Walnut Growers, Inc. v. NLRB*, 53 F.3d 1085, 1088 (9th Cir. 1995) (same); *NLRB v. International Union of Operating Engineers, Local 520*, 15 F.3d 677, 679 (7th Cir. 1994) (same).

The *Bill Johnson's* opinion leaves no room for BE&K's argument that the Sixth Circuit—and the District of Columbia, Second, Seventh and Ninth Circuits—have all misunderstood this Court's *Bill Johnson's* rulings.[2] The

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[2] The Petitioner and its *amici* are on no firmer ground in contending that the *Bill Johnson's* rule is one-sided. The NLRB has shown itself

Petitioner would have it that there is *no* legal distinction between the NLRB's authority to enjoin *pending* retaliatory lawsuits, on the one hand, and the NLRB's authority to remedy *adjudicated* retaliatory lawsuits as unfair labor practices by ordering the lawsuit plaintiff to pay the lawsuit defendants' legal fees and costs, on the other. *See* Pet. Br. 20-21. In both instances, says the Petitioner, the Board may only act against a suit that "lacks a reasonable basis."

But, while the *Bill Johnson's* Court said that "the filing and prosecution of a well-founded lawsuit may not be enjoined as an unfair labor practice," the Court also said that, "[i]f judgment goes against the employer, . . . the Board may then proceed to adjudicate the . . . unfair labor practice" by "determining whether the suit had been filed in retaliation for the exercise of the employees' § 7 rights." 461 U.S. at 743 & 747. *See also id.* at 749 ("If the state proceedings result in a judgment adverse to the plaintiff, the Board may then consider the matter further and, if it is found that the lawsuit was filed with retaliatory intent, the Board may find a violation and order appropriate relief.").

The distinction between the Board's authority with regard to "retaliatory lawsuit" unfair labor practice claims before the underlying litigation has gone to judgment and the Board's authority after the underlying litigation has been adjudicated against the plaintiff is central to the *Bill Johnson's* decision and is stressed repeatedly throughout the opinion. The Sixth Circuit's decision enforcing the NLRB's order in this case faithfully adhered to the distinction drawn in *Bill Johnson's*. As the court below observed, BE&K's lawsuit against the

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ready and able to protect both employers and employees against litigation brought by unions in violation of the NLRA. *See, e.g., Local 32B-32J, Service Employees v. NLRB*, 68 F.3d 490, 493-494 (D.C. Cir. 1995) (awarding attorneys fees to an employer for an arbitration claim brought by a union in violation of NLRA § 8(b)(4)).

Unions ended in judgment against the Company and the Board's finding that the lawsuit was brought with a retaliatory motive is supported by substantial evidence on the record. Pet. App. 19a-20a.

II. *PROFESSIONAL REAL ESTATE* DOES NOT CREATE A GENERAL FIRST AMENDMENT STANDARD IMMUNIZING UNMERITORIOUS RETALIATORY LITIGATION FROM THE UNFAIR LABOR PRACTICE PROVISIONS OF THE NLRA

As we have seen, BE&K does make some effort to bend *Bill Johnson's* to the Company's purposes—an effort that, as just shown, is unavailing. But in the main, BE&K rests on the argument that the decision in *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 508 U.S. 49 (1993), makes *Bill Johnson's* "a derelict on the waters of the law," *Lambert v. California*, 355 U.S. 225, 232 (1957) (Frankfurter, J., dissenting). *See* Pet. Br. 25 ("regardless of what confusion might have existed as a result of dicta in *Bill Johnson's*, this Court's decision in *Professional Real Estate* resolved any prior ambiguities").

In this regard, BE&K contends that *Professional Real Estate* declares a "First Amendment standard" that is to be "broadly and uniformly applied in every imaginable context," Pet. Br. 18, *viz.*, a standard providing that "a lawsuit is protected by the First Amendment from statutory liability unless it is 'objectively baseless,'" *id.* at 17.

Professional Real Estate makes no such sweeping claim. To the contrary, *Professional Real Estate* takes care to distinguish between "*applying Noerr* as an antitrust doctrine [and] *invoking* it in other contexts." 508 U.S. at 59 (emphasis added).[3] And, the *Professional Real Estate* Court's stated

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[3] *See Columbia v. Omni Outdoor Advertising*, 499 U.S. 365, 382 (1991) (recognizing that "there may be other remedies" for "wrongful"

purpose was to "define the 'sham' exception to the doctrine of antitrust immunity first identified in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), as that doctrine applies in the litigation context." 508 U.S. at 51.

Consistent with the opinion's focus on *Noerr* immunity as an antitrust law doctrine, *Professional Real Estate*'s definition of the "sham litigation" exception is attuned to the nature of federal court antitrust litigation. In particular, *Professional Real Estate* adopts a definition of the sham exception that is intended to reduce the likelihood that litigants will be chilled from bringing claims to court in good faith because of the prospect that their adversary will retaliate by filing a vexatious treble-damages antitrust lawsuit that will be costly to defend. *Professional Real Estate* does this by providing for a "two-tiered process" for the consideration of "sham litigation" antitrust claims that "requires the plaintiff to disprove the challenged [underlying] lawsuit's *legal* viability before the court will entertain [further] evidence of the suit's *economic* viability [under antitrust standards]." 508 U.S. at 61 (emphasis in original). This permits a "sham litigation" antitrust defendant to assert *Noerr* immunity through summary judgment, thus pretermitting costly discovery and trial litigation on an unsound "sham litigation" claim.

There is not a word, or a hint, in *Professional Real Estate* indicating that its definition of the "sham litigation" exception to *Noerr* antitrust immunity is intended to displace the *Bill Johnson's* NLRA immunity rules derived from the *Noerr* doctrine "by analogy." *Professional Real Estate*, 508 U.S. at 59. Nor is there anything in reason to support the

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conduct, even where "for [purposes of] the Sherman Act, the *Noerr* exemption applies"). *See also id.* at 384 (remanding for further consideration state-law claims based on conduct that was entitled to *Noerr* antitrust immunity).

extension of *Professional Real Estate* to the NLRA context addressed in *Bill Johnson's*. The *Professional Real Estate* definition is carefully calibrated to provide proper protection—in the context of private treble-damage antitrust litigation—to plaintiffs bringing commercial lawsuits. The *Bill Johnson's* rules, by contrast, are carefully calibrated to provide proper protection—in the context of the public law enforcement procedures and limited "fee-shifting" remedies provided by the NLRA—to plaintiffs who bring labor dispute lawsuits.

In the remainder of this brief, we show that the Petitioner's attempt to read *Professional Real Estate* as announcing a sweeping First Amendment standard that requires revision of the *Bill Johnson's* rules fails utterly. We proceed in three steps.

First, we show that there is no First Amendment right to bring an unmeritorious lawsuit for the purpose of harassing and coercing the defendant, even if the plaintiff can assert an arguable basis in law or fact for the ultimately unsuccessful claim.

Second, we show that *Professional Real Estate* defined the sham exception to *Noerr* as a matter of antitrust law in a manner attuned to the nature of antitrust litigation.

Third, we show that the *Professional Real Estate* definition has no place in the "retaliatory lawsuit" unfair labor practice context because of the cardinal differences between a private "sham litigation" treble-damages antitrust lawsuit and an NLRB General Counsel-initiated "retaliatory lawsuit" unfair labor practice proceeding seeking a "fee-shifting" remedy.

A. There Is No First Amendment Right to Bring Unmeritorious Claims to Court for the Purpose of Harassing and Coercing One's Adversary.

Before turning to a detailed consideration of *Professional Real Estate*, it is important to emphasize at the outset that there is *no* First Amendment right to harass and intimidate one's adversaries by filing an unmeritorious lawsuit.

While the First Amendment "mandates free access to the courts for redress of wrongs," it does not sanction manipulation of the legal process by the filing of unmeritorious claims for purposes of "extortion, blackmail or retribution." *Board of Education v. Farmingdale Classroom Teachers Ass'n*, 38 N.Y.2d 397, 404, 343 N.E. 2d 278, 283 (1975). The courts have erected various rules to safeguard against such "perversion of the legal system" on the ground that "[i]t is an affront to the legal system itself, quite apart from the harm to the injured litigant." 1 F.V. Harper, F. James & O.S. Gray, *The Law of Torts* § 4.9, p. 4:106 (3d ed. 1996). *See, e.g.*, Rule 11(b)(1), Fed.R.Civ.P. (requiring certification that a claim "is not presented for any improper purpose, such as to harass").

"[T]he legislature [likewise] has the power to control" litigation that is being "used as the means or the pretext for achieving 'substantive evils'." *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 515 (1972), quoting *NAACP v. Button*, 371 U.S. 415, 444 (1963). While there is a First Amendment right to bring bona fide legal claims to court, "First Amendment rights are not immunized from regulation when they are used as an integral part of conduct which violates a valid statute." *California Motor Transport*, 404 U.S. at 514. Once it has been established that "judicial processes have been abused" and that "abuse of those

processes produced an illegal result," the perpetrator of that wrong "cannot acquire immunity by seeking refuge under the umbrella of 'political expression.'" *Id.* at 513.

As this Court observed in *Bill Johnson's*, "[a] lawsuit no doubt may be used by an employer as a powerful instrument of coercion or retaliation" that is likely to have a "chilling effect . . . upon an employee's willingness to engage in protected activity." 461 U.S. at 740, 741. Where an employer-plaintiff brings and prosecutes an unmeritorious lawsuit, thereby causing the employee-defendants to "incur substantial legal expenses to [successfully] defend against it," *id.* at 740-741, nothing in the First Amendment prevents Congress from making that retaliatory lawsuit a § 8(a)(1) unfair labor practice and authorizing the NLRB to alleviate the intentionally inflicted harm by "order[ing] the employer to reimburse the employees whom he had wrongfully sued for their attorney's fees and other expenses," *id.* at 747. Under this Court's precedents, litigation is not a "constitutionally privileged method of harassing or punishing those who exercise rights protected by §§ 7 and 8 of the NLRA." *Id.* at 755 (Brennan, J., concurring).[4] And, there is nothing in *Professional Real Estate* that suggests to the contrary.

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[4] Indeed, the employee activities protected from "coercion or retaliation" by *Bill Johnson's*, 461 U.S. at 740, are themselves entitled to First Amendment protection. *See Thomas v. Collins*, 323 U.S. 516, 532 (1945); *Thornhill v. Alabama*, 310 U.S. 88, 102-103 (1940). This protection extends to the employees' "freedom to engage in association for the advancement of [their] beliefs and ideas." *NAACP v. Alabama*, 357 U.S. 449, 460 (1958). When "courts [a]re being used to harass and injure individuals" by "those who [a]re bent upon abrogation of [such] federally protected rights," that misuse of the legal system can itself constitute "unconstitutional action." *Mitchum v. Foster*, 407 U.S. 225, 242 & 240 (1972).

B. The *Professional Real Estate* Definition of Sham Litigation.

1. In order to place *Professional Real Estate* in perspective, it is helpful to briefly trace the development of the *Noerr* antitrust immunity doctrine and the sham exception to that immunity.

Noerr antitrust immunity was "developed as a corollary to *Parker* [*v. Brown*, 317 U.S. 341 (1943),]" which "recognized the States' freedom to engage in anticompetitive regulation" notwithstanding the federal antitrust laws. *Columbia v. Omni Outdoor Advertising*, 499 U.S. at 379. *See also id.* at 383 ("*Parker* and *Noerr* are complementary expressions of the principle that the antitrust laws regulate business, not politics").[5] The concern addressed by *Noerr* immunity is that it might be "in derogation of the constitutional right 'to petition the Government for a redress of grievances,' U.S. Const., Amdt. 1, to establish a category of lawful state action that citizens are not permitted to urge." *Id.* at 379.

As a general matter, "[t]hat a private party's political motives are selfish is irrelevant [to the question of antitrust immunity]: '*Noerr* shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose.'" *Omni Outdoor Advertising*, 499 U.S. at 380, quoting *Mine Workers v. Pennington*, 381 U.S. 657, 670 (1965). There is, however, a "'sham' exception to *Noerr* encompass[ing] situations in which persons use the govern-

[5] There is no NLRA correlate to the "state action" exception to the federal antitrust laws articulated in *Parker v. Brown*. To the contrary, "in passing the NLRA Congress largely displaced state regulation of industrial relations." *Wisconsin Dept. of Industry v. Gould Inc.*, 475 U.S. 282, 286 (1986). *See Golden State Transit Corp. v. Los Angeles*, 475 U.S. 608, 613-615 (1986). Thus, the NLRA provides a narrower statutory base than the antitrust law for petitioning immunity.

mental *process*—as opposed to the *outcome* of that process—as an anticompetitive weapon." *Omni Outdoor Advertising*, 499 U.S. at 380 (emphasis in original).

Thus, in *California Motor Transport*, the Court held both that *Noerr* immunity applies to the antitrust litigation context and that the "sham exception" to *Noerr* immunity makes actionable litigation that is instituted "with or without probable cause, and regardless of the merits of the cases" in order to "deprive the [plaintiff's] competitors of meaningful access to the agencies and courts." 404 U.S. at 510 & 512.

But *California Motor Transport* "left unresolved the question . . . whether litigation may be sham merely because a subjective expectation of success does not motivate the litigant." *Professional Real Estate*, 508 U.S. at 57. As a result, "[t]he Courts of Appeals . . . defined 'sham' in inconsistent and contradictory ways." *Id.* at 55.

2. *Professional Real Estate*—which brought this circuit conflict to the Court—arose as follows.

Columbia Pictures sued Professional Real Estate "for alleged copyright infringement," and PRE "counterclaimed, charging Columbia with violations of §§ 1 and 2 of the Sherman Act . . . alleg[ing] that Columbia's copyright action was a mere sham that cloaked underlying acts of monopolization and conspiracy to restrain trade." 508 U.S. at 52. "The parties filed cross-motions for summary judgment on Columbia's copyright claim and postponed further discovery on PRE's antitrust counterclaims." *Id.* After the district court granted summary judgment in PRE's favor on the copyright claim and the court of appeals affirmed this ruling, "Columbia sought summary judgment on PRE's antitrust claims, arguing that the original copyright infringement action was no sham and was therefore entitled to immunity under *Eastern Railroad Presidents Conference v. Noerr Motor Freight*." *Id.*

at 53. The district court granted Columbia's motion on the ground that "there was probable cause for bringing the [copyright] action" and "denied PRE's request for further discovery on Columbia's intent in bringing the copyright action." *Id.*

On appeal, "PRE d[id] not challenge the district court's finding that the infringement action was brought with probable cause, i.e., that the suit was not baseless." *Columbia Pictures v. Professional Real Estate Investors*, 944 F.2d 1525, 1530 (9th Cir. 1991). "Rather, PRE argue[d] that the copyright infringement lawsuit [wa]s a sham because Columbia Pictures did not honestly believe that the infringement claim was meritorious" and that "Columbia Pictures' subjective intent in bringing the suit was a question of fact precluding entry of summary judgment." *Id.* In making this argument, PRE relied upon *In re Burlington Northern, Inc.*, 822 F.2d 518 (5th Cir. 1987), which held that "the determinative [sham litigation] inquiry is not whether the suit was won or lost, but whether it was significantly motivated by a *genuine* desire for judicial relief." *Columbia Pictures*, 944 F.2d at 1530, quoting *In re Burlington Northern, Inc.*, 822 F.2d at 528 (emphasis in original).

In rejecting PRE's argument, the Ninth Circuit noted that "[u]nlike the Fifth Circuit, we have held that a suit must be baseless to lose its protection under the *Noerr-Pennington* doctrine." 944 F.2d at 1530. The Ninth Circuit explained its understanding of the "sham exception" as follows:

> "[A]n antitrust plaintiff must make a two-part showing to support a finding of sham: (1) that the suit is baseless—a legal question; and (2) that the suit was brought as part of an anticompetitive plan external to the underlying litigation—a question of fact." *Id.* at 1532 (citation omitted).

3. On *certiorari*, this Court endorsed the view of the Ninth Circuit and rejected that of the Fifth Circuit. *See* 508 U.S. at

55 n. 3. In so doing, the Court "outline[d] a two-part definition of 'sham' litigation," as follows:

> "First, the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits. If an objective litigant could conclude that the suit is reasonably calculated to elicit a favorable outcome, the suit is immunized under *Noerr*, and an antitrust claim premised on the sham exception must fail. Only if challenged litigation is objectively meritless may a court examine the litigant's subjective motivation. Under this second part of our definition of sham, the court should focus on whether the baseless lawsuit conceals 'an attempt to interfere *directly* with business relationships of a competitor,' *Noerr*, *supra*, at 144 (emphasis added), through the 'use [of] the governmental *process*—as opposed to the *outcome* of that process—as an anticompetitive weapon.' *Omni*, 499 U.S., at 380 (emphasis in original)." 508 U.S. at 60-61.

The Court explained that "[t]his two-tiered process requires the plaintiff to disprove the challenged lawsuit's *legal* viability before the court will entertain evidence of the suit's *economic* viability." 508 U.S. at 61 (emphasis in original). And, the Court added that "[w]here, as here, there is no dispute over the predicate facts of the underlying legal proceeding, a court may decide probable cause as a matter of law." *Id.* at 63. "The existence of probable cause eliminate[s] any 'genuine issue as to any material fact,' Fed. Rule Civ. Proc. 56(c), and summary judgment properly [may be] issued." *Id.* at 66.

In holding that "the Court of Appeals properly affirmed summary judgment for Columbia on PRE's antitrust counterclaim," 508 U.S. at 62, this Court cited in particular the portion of the lower court's opinion cautioning that "[b]ecause the sham exception to the *Noerr-Pennington* rule may have a chilling effect on those who seek redress in the

courts, . . . the exception should be applied with caution." *Columbia Pictures*, 944 F.2d at 1531, citing *Rickards v. Canine Eye Registration Foundation*, 783 F.2d 1329, 1334 (9th Cir. 1986) ("The application of the sham exception to single lawsuits may have a chilling effect on those who in good faith seek redress in the courts.").

That caution rests on the recognition that "[w]hen the discovery burdens of antitrust cases are combined with the threat of treble damages, the prospect of defending an antitrust action can become a most potent weapon to deter the exercise of first amendment rights." *Hydro-Tech Corp. v. Sundstrand Corp.*, 673 F.2d 1171, 1177 n. 8 (10th Cir. 1982). Given the threat that "expensive and burdensome antitrust litigation . . . would drag on through the discovery stage at least," it is very much to the point that "'the mere pendency of the action w[ould] chill the exercise of First Amendment rights.'" *Id.*, quoting *Franchise Realty Interstate Corp. v. San Francisco Local Joint Exec. Bd. of Culinary Workers*, 542 F.2d 1076, 1083 (9th Cir. 1976), *cert. denied*, 430 U.S. 940 (1977). That being so, "[t]he ultimate determination, after trial, that an antitrust claim is unfounded, may come too late to guard against the evils that occur along the way." *Lupia v. Stella d'Oro Biscuit Co.*, 586 F.2d 1163, 1167 (7th Cir. 1978).

The two-tiered definition of "sham litigation" adopted by this Court in *Professional Real Estate* is thus responsive to the concern that "antitrust litigation . . . can be, from the very beginning, a most potent weapon to deter the exercise of First Amendment rights." *Franchise Realty*, 542 F.2d at 1082. By allowing summary judgment on grounds of *Noerr* immunity, the *Professional Real Estate* definition erects a "barrier[] to safeguard [First Amendment] guarantees" from "the threat of harassing litigation." *Id.*

The *Professional Real Estate* "sham litigation" definition, then, effectuates Justice Harlan's point that, "having regard

for the special temptations that the statutory private antitrust remedy affords for the institution of vexatious litigation, and the inordinate amount of time that such cases sometimes demand . . ., there is good reason for giving the summary judgment rule its full legitimate sweep in this field." *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 478 (1962) (Harlan, J., dissenting). As the *Professional Real Estate* opinion demonstrates, the "objective component" of the sham litigation exception plays an important role in the prompt, summary disposition of an antitrust case on grounds of *Noerr* immunity, by allowing the antitrust court, where "there is no dispute over the predicate facts of the underlying legal proceeding, . . .[to] decide probable cause [in that litigation] as a matter of law." 508 U.S. at 58 & 63.

In sum, *Professional Real Estate* states a rule of antitrust law that is carefully attuned to the context of antitrust litigation. That is both the office of the rule and its natural limits.

C. Unfair Labor Practice Proceedings Under the NLRA.

Private antitrust litigation is critically different from NLRA unfair labor practice proceedings in ways that make the *Professional Real Estate* "objectively baseless" summary judgment rule the proper approach for implementing *Noerr* immunity in the antitrust litigation context and the *Bill Johnson's* unsuccessful-litigation/retaliatory-motivation standard of liability the proper approach for implementing the analogous immunity in the unfair labor practice proceedings context.

First, the antitrust laws are enforced through private lawsuits brought in federal or state court and tried to a judge or a jury; the unfair labor practice provisions of the NLRA, in contrast, are enforced through administrative proceedings brought by a public prosecutor. This Court has recognized that immunity from private litigation does *not* automatically

translate into immunity from public prosecution. *See Briscoe v. LaHue*, 460 U.S. 325, 339 n. 22 & 341 n. 26 (1983) (witnesses enjoy common law immunity from damages for false testimony but not immunity from criminal prosecution for perjury); *Imbler v. Pachtman*, 424 U.S. 409, 429 (1976) ("This Court has never suggested that the policy considerations which compel civil immunity for certain governmental officials also place them beyond the reach of the criminal law."). And, as we develop in the first point immediately below, the public law enforcement scheme of the NLRA in itself provides important safeguards for the right of plaintiffs to bring their legal claims to court.

Second, under the antitrust laws, "[t]he threat of treble damages may discourage the filing of meritorious claims, or preclude plaintiffs from asserting novel or cutting-edge theories of liability." *Rickards*, 783 F.2d at 1334. NLRA "retaliatory lawsuit" unfair labor practice proceedings pose no such threat—their remedial point is to shift the costs of the wrongful litigation from the successful defendant to the unsuccessful plaintiff responsible for generating those costs.

1. Under the NLRA, the NLRB General Counsel "has 'final authority' regarding the filing, investigation, and 'prosecution' of unfair labor practice complaints." *NLRB v. United Food & Commercial Workers*, 484 U.S. 112, 124 (1987), quoting 29 U.S.C. § 153(d). *See Vaca v. Sipes*, 386 U.S. 171, 182 (1967) ("the Board's General Counsel has unreviewable discretion to refuse to institute an unfair labor practice complaint"). There is thus no danger of a private litigant initiating vexatious "retaliatory lawsuit" unfair labor practice proceedings for the purpose of imposing litigation costs on the respondent. No proceedings will be initiated unless the NLRB General Counsel finds merit to the charge that unfair labor practices have occurred.

Against that background, the "retaliatory motive . . . element[] of the *Bill Johnson's* unfair labor practice

analysis," Pet. App. 20a, ensures that unfair labor practice proceedings will be initiated only when there is evidence that the unsuccessful litigation was brought for the purpose of harassing and coercing employees in the exercise of NLRA protected rights. In the ordinary NLRA § 8(a)(1) case, an unfair labor practice can be established by showing *either* "employer conduct that is intended to restrain, *or* that has the likely effect of restraining, employees in the exercise of protected activities." *Bill Johnson's*, 461 U.S. at 740 (emphasis added). *See American Frieghtways Co.*, 124 NLRB 146, 147 (1959) ("the test of interference, restraint, and coercion under Section 8(a)(1) of the Act does not turn on the employer's motive"). By requiring a snowing of retaliatory motive, the NLRB treats "going to a judicial body for redress of alleged wrongs" differently from "other forms of action directed at . . . employees . . . exercising a protected right." *Id.* at 741, quoting *Peddie Buildings*, 203 NLRB at 272.[6]

The retaliatory motive element of the *Bill Johnson's* unfair labor practice analysis plays an essentially similar role in reducing the risk that plaintiffs will be chilled in exercising their rights to the role played in antitrust litigation by the "objectively baseless" step in the "two-tiered" summary judgment process defined in *Professional Real Estate*. The

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[6] *See, e.g., Roundout Electric, Inc.*, 329 NLRB 957, 958 (1999) (no unfair labor practice found where state court dismissed the employer's trespass charges against union organizers, because "[g]iven the Respondent's clear toleration of workplace organizing, [the Board could]not conclude that it filed [the] charges to retaliate against protected activity"); *Bakery Workers Local 6 (Stroehman Bakeries)*, 320 NLRB 133, 139 (1995) ("We have carefully considered the record in this case and cannot find that the General Counsel has met his burden of establishing the Respondent's filing of its district court lawsuit was motivated by a desire to retaliate against the exercise of Section 7 rights.").

General Counsel will *not* issue a retaliatory litigation unfair labor practice complaint, unless his investigation establishes that there is sufficient evidence "[o]n the record" generated by his investigation into the unfair labor practice charges to "demonstrate that the Employer's suit had a retaliatory motive." *Paragon General Contractors & Cabinetmakers, Inc.*, Case No. 32-CA-18569-1, 2001 WL 1155402 at *4 (NLRB GC Mem., June 22, 2001). The determination of whether there is sufficient evidence to demonstrate retaliatory motivation is made "in light of the General Counsel's burden of proof." *Id. See also Omni Electric, Inc.*, Case No. 8-CA-23905, 1991 WL 322617 at *4 (NLRB GC Mem., Dec. 16, 1991).[7]

If anything, the General Counsel's unreviewable discretion to refuse to initiate unfair labor practice proceedings provides a greater measure of protection against the threat of vexatious litigation than the "objectively baseless" standard adopted in *Professional Real Estate* for deciding sham litigation claims in the antitrust context. 508 U.S. at 61. This is so, because, even under *Professional Real Estate*, the antitrust plaintiff can initiate a lawsuit by merely alleging an antitrust violation and the defendant bears the burden of moving for summary judgment. Under the post-judgment "retaliatory litigation" standard established in *Bill Johnson's*, by contrast, no unfair labor practice proceeding will even be initiated against the respondent-employer unless the charging party can convince the General Counsel that there is sufficient evidence to

[7] Of course, before issuing a retaliatory litigation complaint, the NLRB General Counsel must also find that the employer's lawsuit tended "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7," 29 U.S.C. § 158(a)(1), and that the lawsuit has come to a conclusion adverse to the employer, *Paragon General Contractors*, 2001 WL 1155402 at *3.

establish that the unsuccessful litigation was conducted for the purpose of retaliating against employees for their exercise of NLRA § 7 rights.

Should the NLRB General Counsel decide to issue a retaliatory lawsuit unfair labor practice complaint, the prosecution of the complaint remains under the control of the General Counsel at all times. *See Williams v. NLRB*, 105 F.3d 787, 790-791 n. 3 (2d Cir. 1996). The General Counsel decides not only whether a complaint shall issue, but "what is and what is not at issue in an unfair labor practice case." *Id.* at 790 n. 3 (brackets and citation omitted). Thus, the charging party is *not* permitted "to introduce evidence to support theories of violations other than the theory relied upon by the General Counsel." *Id.* at 790-791 n.3 (ellipses, brackets and citation omitted). And, the risk of vexatious litigation tactics is reduced even further by the fact that there is no pre-trial discovery in NLRB proceedings. *NLRB Casehandling Manual* § 10292.4.[8]

2. The affirmative "fee-shifting" relief awarded by the NLRB for a retaliatory lawsuit unfair labor practice is limited and stands in stark contrast to the punitive treble damages that are awarded as a matter of right to successful private antitrust plaintiffs. *See* 15 U.S.C. § 15(a).

"The threat of treble damages" is an independent reason that the prospect of defending a sham-litigation antitrust suit "may have a chilling effect on those who in good faith seek redress in the courts." *Rickards*, 783 F.2d at 1334. As this

[8] In unfair labor practice cases, factual inquiries are accomplished by means of NLRB-issued subpoenas requiring the presence of witnesses or documents at the hearing on the merits of the General Counsel's complaint. 29 C.F.R. §§ 102.30 & 102.31. The subpoenas may be enforced only by the General Counsel, acting on behalf of the NLRB; private parties have no enforcement authority. 29 U.S.C. § 161(2). The hearing to which the witnesses are called is administrative in nature and is not a trial before a judge or jury. 29 C.F.R. §§ 102.34-102.39.

Court has observed, "[t]he very idea of treble damages reveals an intent to punish past, and to deter future, unlawful conduct, not to ameliorate the liability of wrong-doers." *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 639 (1981).

In the "retaliatory litigation" unfair labor practice context, as this Court noted in *Bill Johnson's*, affirmative relief is limited to an order requiring "the employer to reimburse the employees whom he had wrongfully sued for their attorney's fees and other expenses," 461 U.S. at 747. *See, e.g., Petrochem Insulation, Inc. v. NLRB*, 240 F.3d at 34-35; *Geske & Sons, Inc., v. NLRB*, 103 F.3d 1366, 1378-79 (7th Cir. 1997); *Local 32B-32J, Service Employees v. NLRB*, 68 F.3d at 493-494. In contrast to the regulatory scheme of the antitrust laws, "[t]he regulatory scheme established for labor relations by the Act is 'essentially remedial,' and the Board is not generally authorized to impose penalties solely for the purpose of deterrence or retribution." *Wisconsin Department of Industry v. Gould*, 475 U.S. at 288 n. 5, quoting *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 10 (1940).[9]

On any measure, requiring an unsuccessful litigant to bear all of the costs generated by the litigation, including the costs incurred by the prevailing party, cannot be said to interfere with the litigant's First Amendment petitioning rights. "Fee shifting requires the party that creates the costs to bear them," and "the first amendment does not prevent the government from requiring a person to pay the costs incurred in exercising a right." *Premier Electrical Construction Co. v. N.E.C.A., Inc.*, 814 F.2d 358, 373 (7th Cir. 1987). Fee-shifting—even without a showing of bad motive—is common throughout the

[9] Indeed, the Board undertakes to remedy only the *economic* harm caused by unfair labor practices, leaving to the common law courts the task of remedying other sorts of harm such as injury to persons or property. *See, e.g., Graves Trucking, Inc. v. NLRB*, 692 F.2d 470, 475 (7th Cir. 1982).

law. *See Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 524-525 & n. 12 (1994) (discussing various fee-shifting statutes).[10] And, the constitutionality of this device has never been seriously called into question.

CONCLUSION

The judgment of the Court of Appeals enforcing the decision and order of the National Labor Relations Board should be affirmed.

Respectfully submitted,

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[10] For example, the Norris-LaGuardia Act requires, as a precondition to the issuance of any injunctive relief in a labor dispute, the filing of "an undertaking with adequate security in an amount to be fixed by the court sufficient to recompense those enjoined for any loss, expense, or damage caused by the improvident or erroneous issuance of such order or injunction, *including all reasonable costs (together with a reasonable attorney's fee) and expense of defense against the order or against the granting of any injunctive relief sought in the same proceeding and subsequently denied* by the court." 29 U.S.C. § 107 (emphasis added).